UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

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Case No. Civ. 11-4071

PLANNED PARENTHOOD MINNESOTA, NORTH DAKOTA, SOUTH DAKOTA, and CAROL E. BALL, M.D.,

Plaintiffs,

-vs-

DENNIS DAUGAARD, Governor, MARTY JACKLEY, Attorney General, DOREEN HOLLINGSWORTH, Secretary of Health, Department of Health, and MARGARET HANSEN, Executive Director, Board of Medical and Osteopathic Examiners, in their official capacities,

Defendants.

U.S. District Courthouse
Sioux Falls, SD
June 27, 2011
1:30 o'clock p.m.

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MOTION HEARING

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BEFORE: The Honorable Karen E. Schreier
Chief U.S. District Court Judge

APPEARANCES:

Ms. Mimi Y.C. Liu
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-and-

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-and-

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for the Plaintiffs

Mr. John P. Guhin
Ms. Patricia J. DeVaney
Attorney General's Office of South Dakota
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for the Defendants

THE COURT: This is the time scheduled for a hearing on the Motion for a Preliminary Injunction or a TRO in the matter entitled Planned Parenthood vs. Dennis Daugaard, et al.

Would counsel please note their appearances for the record?

MS. LIU: Mimi Liu for the Plaintiffs, Your Honor.

MR. BELL: Stephen Bell, Dorsey & Whitney, LLP, for the Plaintiffs.

MS. AMIRI: Brigitte Amiri, ACLU, for the Plaintiffs.

MR. GUHIN: John Guhin for the State Defendants.

MS. DeVANEY: Patty DeVaney for the State Defendants.

THE COURT: Counsel, do either of you plan on presenting any evidence today or just argument?

MS. LIU: Just argument, Your Honor.

MR. GUHIN: Just argument.

THE COURT: Okay. Then the Plaintiffs are the moving party. You may proceed.

MS. LIU: Good afternoon, Your Honor. May it please the Court. My name is Mimi Liu, and I represent the Plaintiffs Planned Parenthood and Dr. Carol Ball.

Plaintiffs have asked the Court to issue a preliminary

injunction to prevent H.B. 1217 from taking effect on Friday, so that the status quo will remain in place, and Plaintiffs and our patients will not suffer irreparable harm while this case is pending. Plaintiffs have demonstrated that we are likely to prevail on the merits of our claims, and the State has not refuted this showing.

Under the pretext of ensuring voluntary, uncoerced, and informed consent to abortion, the Act both has the purpose and effect of restricting women's access to abortion by imposing multiple extreme requirements, none of which are required by any other state in this country, in a state where women are already severely hampered in their ability to exercise their constitutional right to choose to terminate their pregnancies.

To briefly summarize, Your Honor, the Act imposes the longest and most extreme mandatory delay in the country requiring that each patient make two trips to the clinic; an unprecedented assessment for so-called coercion, as that term is broadly and vaguely defined in the Act; an unprecedented third trip to a so-called pregnancy help center that by statutory definition is not required to be regulated, licensed, or subject to any standards or oversight or qualifications whatsoever, other than that it is required to be opposed to abortion; an unprecedented requirement that every woman disclose her most intimate

personal and medical information to that pregnancy help center, and be subjected to further assessment for so-called coercion; and an assessment for so-called risk factors and complications associated with abortion that is a drastic departure from accepted medical practice and imposes impossible or nearly impossible requirements on physicians and requires physicians to give false and misleading information to their patients.

The Act, as a whole, is unconstitutional, because it was passed with the improper purpose of restricting access to abortion. Each of its requirements is also independently unconstitutional.

I will begin by addressing improper purpose, Your Honor, and then move on to the additional constitutional problems with each of the requirements.

THE COURT: Let me ask one question first. You laid out basically four different areas. Do those -- are any of those restrictions part of any states' laws anywhere else in the United States?

MS. LIU: No, Your Honor.

THE COURT: All four of them are unique to South Dakota?

MS. LIU: That's correct.

THE COURT: All right.

MS. LIU: The Act has an improper purpose. The

State does not deny the context in which this Act arises; namely, it is the latest in a series of efforts by the Legislature, the sponsors, and the proponents to ban and severely curtail access to abortion in this state.

The State also does not deny that the requirements imposed by this Act are extreme, in many cases wholly unprecedented, and would be the only such requirements of their kind, as I just mentioned, Your Honor, ever imposed by any state.

The Act is targeting Planned Parenthood, the only abortion provider in the state, and the State does not seriously deny that numerous false statements were made by the Act's sponsors, among others, about Planned Parenthood and its practices to secure passage of the Act. These false statements, as our papers show, Your Honor, were significant. Indeed, they were the reasons cited for why the requirements imposed by the Act are necessary.

I'm not aware, Your Honor, of any case with this background and history, not Mazurek, not Karlin, not even Atchison where they found an improper purpose. All this demonstrates is that the legislators' alleged purpose of ensuring informed consent is a sham, and Courts have made clear that we are not to accept the Government's proffered purpose if it is a sham.

THE COURT: Since Atchison, has another abortion

statute been struck down based on improper purpose?

MS. LIU: Yes, Your Honor. In fact, last year in the Nebraska litigation, which challenged the risk factors requirement, virtually identical to the risk factors requirement here, the District Judge in Nebraska struck that provision down on the basis of both improper purpose and having the effect of imposing undue burden on women seeking abortion.

THE COURT: Atchison would be the last Supreme Court case that relied on that?

MS. LIU: Atchison, Your Honor, is an Eighth Circuit decision. As far as I'm aware, yes, it is the last Eighth Circuit decision.

THE COURT: I meant Eighth Circuit. Thank you.

MS. LIU: I would just like to point out, Your Honor, also, that the State's own efforts to defend the law further support improper purpose.

With respect to the three-day mandatory delay, the State says patients need more time because of all the important information that Plaintiffs must give the patient about the fetus, about the risks of the abortion, about the risks of the alternative, and about the assistance and support that can help them through their pregnancy. I quote the State, "It is clear that the amount of information extended to women is substantial, more

substantial, in fact, than in many cases involving medical procedures."

Then, Your Honor, with respect to the pregnancy help center mandate, the State defends it on precisely the opposite grounds. They say that women need to go to pregnancy help centers precisely because Plaintiffs only provide, and I quote, "the bare minimum of information."

These conflicting statements, Your Honor, are simply further proof that this is all about piling on more and more restrictions to a woman's right to exercise -- to a woman's ability to exercise their constitutional right to terminate their pregnancy, and that this is not about furthering any proper purpose.

I would like to move now, Your Honor, to the pregnancy help center mandate. First, the pregnancy help center mandate violates the First Amendment right against compelled speech. As the Supreme Court stated long ago in Wooley v. Maynard, the First Amendment protects both the right to speak and the right to refrain from speaking. The pregnancy help center mandate requires women to speak about their pregnancy, their decision to have an abortion, and the circumstances surrounding that decision, or information that the Supreme Court in Casey found is one of the most intimate and personal choices a person may make. This speech involves both fact and belief, and both are

protected in this context by the First Amendment.

The State, Your Honor, doesn't seriously dispute that if this mandate is regulating speech, it would violate the First Amendment. Instead, the crux of their argument is that this is not about speech. This is about regulating conduct, namely, abortion.

That is wrong. The pregnancy help center mandate clearly requires and regulates speech. One of the two so-called parameters of the mandate is that women must have a consultation and shall have a private interview to discuss her circumstances that may subject her decision to coercion. This discussion must be sufficient to convince the pregnancy help center that the woman has made her decision free from coercion. Thus, the requirement and regulation of speech appears unmistakably on the face of the statute.

And then this discussion is necessary, the State argues, because the 20 minutes to an hour that Plaintiffs spend discussing with the patient her decision is insufficient. There can be no real disagreement that speech compulsion is core to the pregnancy help center mandate.

THE COURT: The State argues that the woman doesn't really need to consult when she's there. She can just go give her name and the name of her abortion

provider. If that's all she's providing, does that really rise to the level of speech?

MS. LIU: Your Honor, that clearly flies in the face of the plain language of the statute. The statute requires that prior to the day of the scheduled abortion, the pregnant woman must, and I'm quoting from the statute, "must have a consultation at a pregnancy help center and shall have a private interview to discuss her circumstances that may subject her decision to coercion."

So if the woman does not speak about her decision to have the abortion and the circumstances surrounding her decision to have the abortion, I submit on the face of the statute that she cannot certify to the physician that she has engaged in that consultation and that private interview to discuss her circumstances.

The PHC mandate, Your Honor, also violates the constitutional right to informational privacy. I think the Eighth Circuit has made abundantly clear that the constitutional right to informational privacy protects the woman's decision to terminate her pregnancy, and the State does not take serious issue with this. Instead, what the State argues is that the confidentiality of patients' information will be protected by the pregnancy help centers.

This wholly misses the mark, Your Honor. A woman's

informational privacy right is first violated by the fact of having to disclose their personal information to the pregnancy help centers. No Court has ever sanctioned that every patient turn her private abortion information over to members of the public, and here we are not just talking about any members of the public. We are talking about anti-abortion so-called counselors that the Supreme Court in Hill vs. Colorado said women seeking abortion have a privacy interest in avoiding.

Even if the State, Your Honor, could prove there's some need for patients to disclose their most intimate, sensitive, personal, and medical information to these hostile members of the public, no need could outweigh the utter lack of safeguards in the statute to protect this information from being further disclosed to additional members of the public.

THE COURT: But doesn't the statute preclude the center from disclosing any of that information?

MS. LIU: The statute, Your Honor, yes, it does include one line that says that the pregnancy help center cannot release the information unless in accordance with Federal, state, or local law. Even if that provision were clear, Your Honor, the State concedes there are no penalties for violating this provision, and the Act imposes no duties or liabilities on the pregnancy help centers if

they disregard this provision.

This is unlike the statutes, Your Honor, at issue in Whalen and Tucson where Courts have considered the right to informational privacy. In both of those statutes there were more safeguards than there are here. In Whalen, where they upheld the law, Your Honor, the Court pointed to the fact that there were criminal penalties for violation, and in Tucson, Your Honor, the lack -- not even the lack, but the fact that the criminal and civil penalties for further disclosure in the statute were unclear led to the Court striking down that law on informational privacy grounds.

In those cases, Your Honor, we are talking about the Government, the information going to the Government. In Tucson the Court said the safeguards were not sufficient.

Here we are talking about the information going directly to a member of the public, and a member or members of the public that the Supreme Court in Hill has said patients seeking abortion have a privacy interest in not interacting with.

In this context, Your Honor, I submit there needs to be even further safeguards than there were when the Government is receiving the information. Those safeguards are utterly lacking, Your Honor.

I think our papers are fairly clear on the undue burden argument with respect to the pregnancy help center

mandate, Your Honor. There are a number of circumstances in which the Supreme Court has made clear that the lack of certain safeguards in the statute are ipso facto or, per se, undue burden. Those situations are where the statute lacks safeguards for the confidentiality of the patients, where the statute lacks safeguards to ensure that decisions are made without delay, and where there are no safeguards to protect against the disclosure of untruthful and misleading information, Your Honor.

In this case, I think as we have made clear in our papers, this statute lacks all three of those safeguards. For that reason is also unconstitutional, because it imposes an undue burden on our patients.

I would like to jump forward, Your Honor, to the mandatory delay requirement. This is the most extreme mandatory delay law in the country, combined with the most extreme facts regarding availability of abortion services and characteristics of women who seek them.

The Supreme Court in Casey clearly contemplated that there would be situations in which a mandatory delay law would impose an undue burden. In Justice Blackmun's concurrence, Your Honor, he said that he was confident that in the future evidence will be produced to show that in a large part of the cases in which these regulations are relevant, they will operate as a substantial obstacle to a

woman's choice to undergo an abortion. I submit, Your Honor, that this is that future case that Justice Blackmun was envisioning.

The State argues that Plaintiffs must show that a mandatory delay prevents a large fraction of women from obtaining abortion. As our Reply papers state, Your Honor, neither the Supreme Court, nor the Eighth Circuit, has ever endorsed the notion that women must be prevented from obtaining abortions to prove undue burden. Indeed, Casey, Atchison, and Dempsey stand for the fact that a law that impedes or prevents abortion or imposes something more than an incidental effect of making abortions more difficult would be an undue burden.

But even if, Your Honor, the tests were prevent, the circumstances for our patients in South Dakota are so dire that this Court could find even that standard is met; that it will force women out of state and prevent others altogether from accessing an abortion.

In addition, the State argues that large fraction means something more than 50 percent. Neither the Supreme Court, nor the Eighth Circuit, has ever engaged in that sort of mathematical analysis of large fraction. I just want to touch briefly, Your Honor, on --

THE COURT: In fact, the Supreme Court doesn't use the word "majority." Right? They use "large

fraction."

MS. LIU: Correct, Your Honor. They do not use the word "majority." They use the term "large fraction." And they certainly do not engage in any type of qualitative analysis of large fraction.

Indeed, in Miller, the Eighth Circuit case, Your Honor, the Court considered mature and best interest minors who did not qualify for an abuse exception in the context of a parental notice law. In that case the Court also did not engage in any type of quantification of large fraction, nor did they find that a majority of those minors would face a substantial obstacle if they had to notify one parent of their intent to seek an abortion.

Yet after considering the hardships that the one-parent notification would impose in some cases on mature and best-interest minors, the Court concluded that it was an undue burden in a large fraction of cases.

The State also ignores facts about the Act's impact in South Dakota. The State's defense for why the mandatory delay is not an undue burden is centered around the argument that South Dakota is no different than Pennsylvania, the state at issue in Casey, and other states where Courts have upheld two-trip laws.

Key to this defense is the State's claim that the Act does not require the physician who performs the abortion to

do the initial consultation. Notably, the State concedes that reading the Act to require the same physician would be hostile to the constitution, and they do not even try to defend the Act under that reading.

The State's construction, Your Honor, is far from obvious from the face of the Act, but even if the Court adopts this construction, it does not save the mandatory delay.

First of all, the 72-hour waiting period will automatically prevent women who are near the end of their first trimester, and that is not an insignificant number of our patients, Your Honor, from having an abortion in South Dakota, because there are no second-trimester providers in South Dakota.

Also, the State has utterly failed to show that South Dakota is like any other state in which a Court has upheld a two-trip requirement. Indeed, in Karlin, the Seventh Circuit Court case, on which the State heavily relies, the District Court specifically cited to South Dakota as a state in which the facts established in Casey would not necessarily be applicable and would potentially warrant a different outcome.

Indeed, they do. There's only one abortion provider that offers abortions one day per week. Contrast this with Pennsylvania at the time of Casey, for example, Your Honor,

where there were more than 80 providers, including some who were able to offer services on a daily basis and who were located in many parts of that state.

Second, there are no second-trimester providers at all in South Dakota, and every other state that considered a mandatory delay law had second-trimester providers.

Third, 30 percent of Plaintiffs' patients already travel more than 150 miles each way to get to the Sioux Falls clinic, and of those, half traveled 300 miles or more. Patients from Rapid City, for example, already drive 350 miles each way to the clinic. Those coming from Lawrence County, almost 400 miles. Two trips means traveling 1,500 miles, or almost halfway across the country, to access a supposedly constitutionally protected first-trimester abortion.

Distance, Your Honor, matters. It not only means increased time and cost of the travel itself, but it exacerbates all other burdens; the further a woman has to travel; the longer she needs to be away; the harder and more expensive it is for her to find child care; the harder and more costly it is for her to take time off work; the harder it is for her to leave an abusive partner undetected.

The Karlin District Court was right, Your Honor. South Dakota is different. These burdens are compounded by

the fact that our patients are not rich. More than half live below the Federal poverty level. That is more than double the national average. In 2011 this meant their income was $10,800 or less per year, which translates into about $900 per month. No other case, certainly not Casey, came anywhere close to demonstrating burdens of this magnitude. Yet even in Casey the Supreme Court said it was a closer question.

THE COURT: But wasn't poverty one of the issues discussed in Casey?

MS. LIU: Actually, Your Honor, I don't know that they engaged in any discussion of poverty, beyond the fact that they said the burdens -- the two-trip waiting period would be particularly burdensome for women with the fewest financial resources. We don't know specifically what the poverty data was at that time. I'm not sure that that data was submitted in the District Court. Certainly I'm not aware of any Court that has considered poverty data that is as bad as the facts are in South Dakota.

Lastly, Your Honor, I want to touch briefly on the risk factors mandate.

THE COURT: Going back to the mandatory delay issue. What is the longest period of delay that has been upheld by a Court?

MS. LIU: The longest period of delay is 24

hours, Your Honor. In a State Court case in Planned Parenthood vs. Sundquist in Tennessee, the Court considered a mandatory delay that would effectively be three days. They struck that law down on the basis of strict scrutiny because they were applying the State Constitution. But the Court did also engage in an undue burden analysis. They said on its face that that three-day delay would both have the purpose and the effect of imposing an undue burden.

THE COURT: So the statute said 24 hours, but because of the scheduling of doctors, is that why it was effectively three days?

MS. LIU: No. The statute, Your Honor, I believe said two days. But then the woman could not have the abortion procedure until the third day after the waiting period. So I think based on the calculation on the face of the statute, the Court understood it to impose approximately a 62- to 72-hour waiting period.

THE COURT: And that ended up being a State Supreme Court decision?

MS. LIU: Correct. That was heard by the State Supreme Court. It was considered to violate both the State Constitution and to have both the purpose and effect of imposing a substantial obstacle under the analysis in Casey, Your Honor.

THE COURT: So a 24-hour waiting period is the

longest waiting period that's been upheld by a Court?

MS. LIU: Correct.

There are two major constitutional problems with the risk factors mandate. The first is that it imposes impossible requirements on physicians, and the second is that it requires us to give our patients false and misleading information. Relying on what it found to be credible testimony of Plaintiffs' experts here, another Federal District Court, evaluating a Nebraska law that in all key respects is the same as the risk factors mandate, concluded that the law suffered from both of these constitutional flaws.

THE COURT: And the State here is arguing the State of Nebraska didn't put on any evidence to dispute the Plaintiffs' expert.

MS. LIU: Your Honor, in that case the State offered a construction of the statute that they felt would alleviate the constitutional problems that we raised, and the District Court very explicitly said in her decision that that was not a plausible reading of the statute, and that, in fact, Plaintiffs were correct and their experts were correct in proving that the statute would impose impossible or nearly impossible requirements on physicians, and also that Plaintiffs' experts demonstrated that false and misleading information would be required under the

statute.

I would also submit here, it's ironic that the State complains that the State of Nebraska did not put on any evidence when they have submitted virtually no evidence in support of the risk factors mandate, Your Honor. In fact, what they have submitted is one expert who says that it basically is easy to comply with the statute because "there have been numerous comprehensive reviews published since 1973 which would identify most, if not all, the relevant literature."

Well, Your Honor, that submission by the State's expert is utterly ridiculous. If this were true, then the State's expert should easily be able to identify those reviews. Of course he does not. In fact, he doesn't even suggest that the dozen or so articles that we cite by name in our papers as being required under the Act are part of any so-called comprehensive reviews.

What the State does offer, Your Honor, is a construction of the statute that is wholly unreasonable. They say the statute only requires that the text of the publications be searchable and retrievable by electronic means.

It's not even clear, Your Honor, what this exactly means, because the databases required by the statute, that is, PubMed and PsycINFO, they cannot search the text of any

publication. All they can search are certain fields.

And there are 20 million publications on PubMed that are searchable by electronic means. So even if we were to limit the statute to these 20 million publications that Plaintiffs would have to search, a search for the term "abortion" yields 45,000 results. I think even the State's expert would agree it is impossible, if not nearly impossible, to comb through that many results to find the relevant information required by the Act.

That is all I have, Your Honor, unless there are further questions from the Court.

THE COURT: Well, if the risk factors requirements do require a physician to discuss misleading or untruthful information with a patient, what's the proper judicial remedy? Should the Court just redefine what's meant by risk factors associated with abortion, or should we strike down the provision in its entirety and let the Legislature address the issue? What remedy should the Court impose?

MS. LIU: Well, as the Judge in Nebraska, Your Honor, I believe the proper remedy is to enjoin the entire risk factors mandate, because it is not the judiciary's role or prerogative to rewrite statutes for the Legislature. The State's reading is not a reasonable one. Their evidence does not suggest -- does not overcome the

constitutional flaws pointed out by the Plaintiffs. It is not up to this Court to rewrite that statute, as a Nebraska Judge said, to resolve these constitutional problems.

THE COURT: If the Court finds the risk factors requirements are unconstitutional, what impact would that have on Subsections 1 and 3 of Section 9 of the Act? That's the part that establishes the presumptions of when there's a failure to comply with any of the provisions of this chapter, and it specifically uses this chapter, rather than this Act.

MS. LIU: Your Honor, if you strike the risk factors mandate, then I believe that Section 9, Subsections 1 and 3, can only be required, the sections of this chapter that have not been deemed to be unconstitutional.

THE COURT: So even though this chapter would refer not only to things that are part of this Act, but the entire chapter? So you think the entire -- that section would still be invalid in total?

MS. LIU: That Section 9 would be invalid in total, Your Honor?

THE COURT: Subsections 1 and 3 of Section 9.

MS. LIU: Your Honor, I think that Subsections 9, 1 and 3, what those contemplate are effectively that the information required in this Act would be given, and to the extent that the risk factors mandate is struck, and if the

other new obligations imposed by this Act are struck, I do think that Section 9 is not severable in that regard and would also need to be enjoined.

THE COURT: And do you want to address the coercion requirement?

MS. LIU: Yes, Your Honor. I'll briefly address the coercion requirement.

As we've said in our papers, Your Honor, the coercion requirement captures common situations in which women indicate a desire to have a child, but decide together with their husband, partner, or loved one that it's not the right time for us. And as our experts demonstrated, Your Honor, that is a very common situation when a woman is making a decision to have an abortion. She will consult with her loved ones, with persons she trusts, and together with those people will make a decision to terminate her pregnancy.

The State has not in their construction of the statute suggested whether or not those circumstances would or would not be covered by the Act, and, thus, we submit the Act is unduly broad in that regard. The requirement that we assess for disparity and age, Your Honor, is also vague, because the State in their papers, they argue that that information or that assessment is relevant, and as our physicians have shown, that is not something that is taken

into account when assessing for voluntariness or for coercion, not only in the context of abortion, but in the context of any medical procedure. Thus, Your Honor, the coercion mandate is also unconstitutional.

THE COURT: Do you think the State has a compelling State interest in ensuring that women are not coerced into receiving an abortion?

MS. LIU: Your Honor, I am not here to say whether or not the State has such a compelling interest. I certainly think in the context of ensuring that women are not coerced, as that term is normally understood by our physicians, that we are already under both law, professional and ethical obligations, required to ensure that women are entering into their decision to have an abortion voluntarily and without coercion. Some of those laws, Your Honor, including 34-23A-10.1, would impose criminal penalties on our physicians if we did not already engage in that type of assessment.

But I submit, as we have said in our papers, and as I said in my discussion of the improper purpose, that is not the State's interest here. The State's interest is not about ensuring that women are not coerced. If that were the case, then why do they need to send women, Your Honor, to only organizations that are anti-choice or anti-abortion? If they think it is necessary for women to

seek some type of counseling to ensure that they are not coerced, why could they not go to a licensed therapist or counselor who treats women -- who treats women facing unplanned pregnancies or treats women who are contemplating seeking an abortion.

In addition, Your Honor, they don't even require that the pregnancy help centers have any training or qualifications, or even know the first thing about assessing for coercion.

So given that, Your Honor, I do not think this is about preventing coercion.

THE COURT: So if the doctors are already required, as you stated, to ensure that there's no coercion, are they using the same or a different definition of coercion than exists in the Act that was passed?

MS. LIU: They are using -- Your Honor, my understanding is that under professional and ethical obligations, under both common law and statutory law, physicians are already required to ensure that every woman's decision to enter into the decision to have an abortion and the decision to have any medical procedure is voluntary. I believe that they are using a definition that is not nearly as broad as the definition in this statute. That does not capture many common situations, as I indicated, where women may have some desire to have a

child, but based on discussions with loved ones or with their husband or partner, together make a decision that it is not the right time for them.

THE COURT: So you're saying the definition in the Act here is broader than what physicians would normally use in deciding if someone is voluntarily agreeing to a procedure?

MS. LIU: Correct. I am not aware of this definition of coercion being used by any physician in any context, abortion or otherwise.

THE COURT: Do you know where this definition came from?

MS. LIU: I do not, Your Honor. I know that our physicians, as well as our experts, have said that this definition is extremely broad and not one that is used in the counseling context or in the context of seeking a medical procedure, including abortion, and no other state in the country, Your Honor, has ever imposed -- not only impose on the physicians to engage in this type of coercion assessment, but then impose the additional requirement that women go to pregnancy help centers to again be assessed for coercion, as it is defined in the statute.

THE COURT: Thank you.

MS. LIU: Thank you, Your Honor.

THE COURT: Mr. Guhin, are you arguing for the

State?

MR. GUHIN: Yes, Your Honor. With the Court's permission, I will discuss two issues -- three issues; the standard for the grant of preliminary injunction, the two-visit, three-day delay; and the risk factor provisions.

Ms. DeVaney will discuss the pregnancy help centers in the Act and the First Amendment claims.

Your Honor, I would like to start with the standard for the grant of a preliminary injunction, and certainly one of the most important things that I'm going to say this afternoon or I'd like to stress this afternoon is how difficult it is for a party to sustain its burden of proof to obtain a preliminary injunction after Mazurek and Rounds.

Planned Parenthood has to demonstrate that it's likely to succeed on the merits. It has to carry the burden of persuasion by a clear showing by proof more substantial than in a summary judgment proceeding. It has to do that in the context of a facial challenge. Those are disfavored by the Supreme Court. They're disfavored because they rely on speculative evidence, which is entirely what Planned Parenthood's evidence is.

They disrupt the Democratic process. As we've already seen from the discussion this morning, they don't allow the Courts to determine how a statute actually does work, as

opposed to how an opposing party might say it works.

The proofs in this case from Planned Parenthood are weak. They do not succeed.

Your Honor, the first substantive question I would like to discuss --

THE COURT: Before you get to that, Planned Parenthood argued that these provisions haven't been adopted by any other states. Do you agree with that?

MR. GUHIN: Certainly. Apparently a three-day delay was adopted in Tennessee, and was struck down on State constitutional law grounds in that case.

The other part about that case is there was a reference to undue burden, if my recollection of the case is. There's sort of an add-on paragraph, undue burden, sort of a "by the way" comment, but no substantive analysis there.

These are new claims. I'd like to talk about impermissible purpose and start with what the State's purpose really is, since Planned Parenthood failed to identify that.

The announced purpose of the Bill, in its title and what the sponsors said, was to ensure that any consent to an abortion is voluntary and uncoerced. The Supreme Court has never invalidated provisions of the abortion law on an impermissible purpose point.

We look at Casey. It's clear the Supreme Court simply took the State's announcement of its purpose at face value.

Karlin said, and I think very accurately, you are rarely going to succeed without having some explicit indication that the State was acting in furtherance of an improper purpose. There simply isn't such explicit indication here.

South Dakota does go beyond Casey, and for that reason our friends from Planned Parenthood says that this whole statute has to be invalidated. But it's very clear, another thing pointed out in Karlin is that Casey didn't suggest that the Pennsylvania statute set out the outer limits of permissible abortion regulation. Clearly it didn't. It would have been fantastic if it did, if Pennsylvania somehow arrived at the exact limits to where abortion regulation could go. Casey didn't say it did. It didn't.

We know it didn't, because South Dakota passed a provision requiring a human being disclosure, which goes beyond Casey, and certainly that has been upheld by the en banc Court of Appeals.

The law on abortion is developing. It's developing from Roe, to Casey, to Gonzales. South Dakota is part of that development. That's the simple story. There's nothing wrong with that. This is simply constitutional

development before our very eyes.

What South Dakota is doing is perfectly permissible. States are laboratories of democracy. South Dakota is one of those, and it is active in this area. There's certainly nothing wrong with that, and Planned Parenthood's implications to the contrary are really a blow at Federalism and a blow at developing constitutionalism.

Planned Parenthood complains because South Dakota has a pro-life history. That's no complaint. That would have invalidated their 1995 informed consent provisions -- or 2005 informed consent provisions. It really doesn't mean anything.

Planned Parenthood says, well, there's some inaccurate statements on the floor. I'd like to talk a little bit about the statements that they are complaining about.

The statements reflect the historical Planned Parenthood practice. What came to light in the depositions taken in the 2005 litigation was that a woman met with an abortion doctor just minutes, literally minutes before her abortion in a surgery gown, and basically the whole deal was over. There would be a five-minute conversation with Dr. Ball. That's all you got. Then you have the surgery, and that was it. That was it.

The 2005 Act should have changed this, but it did not, because the Act was enjoined in whole. The injunction was

lifted in 2008. Planned Parenthood should have changed its practices in 2008. What Planned Parenthood is complaining about, as I understand it, is a pair of statements on the floor that may have implied that it did not.

Well, it's striking -- Planned Parenthood is coming to this Court saying, boy, this implication is so clear, by gosh, that the case ought to be decided on it. If it was so clear, why didn't Planned Parenthood correct it? Why didn't it correct it with its own testimony to a committee, or why didn't it correct it through one of its supporters on the floor? When you read the transcript of the proceedings, it clearly had supporters on the floor. Nobody mentioned it. So part of the confusion is certainly Planned Parenthood's responsibility.

Further adding to this sort of confusion is that Planned Parenthood continues to challenge the 2005 Act in Court, even the part we think the Eighth Circuit has validated and this Court validated.

Finally on this point, Planned Parenthood still hasn't put any evidence before this Court, not in its original Brief, not in its Reply Brief filed just last Friday after our Brief was filed, that says exactly what its practice is. We don't know for sure when they meet with -- I can't tell you today for sure when they meet with their patients. They didn't put any evidence on to the contrary. They've

had plenty of opportunity to do so, now three months since the Bill, and they've been able to look at our Brief and see that this matter was in controversy.

In any event, Legislators can be presumed to know what the 2005 Act demanded, and it's certainly fanciful to suggest, as Planned Parenthood does, that this 11-page Bill was created somehow so these statements could be made. That's kind of what I'm getting out of it.

Planned Parenthood says the delay is not reasonable, the three-day delay, and the two-visit delay is not reasonable and lacks rational basis. I'll combine what I talked about in Parts I(B) and II(A). There is affirmative evidence in the record that the delay would be of real assistance.

Dr. Calhoun testified that many women are ambivalent about their decision. They waiver back and forth. And he said the decision and fluctuation alone would justify the value of a 72-hour reflective period.

Dr. Coyle said time is of the essence to healthy decision-making, and the 72-hour period allows her to fully consider all her options and to talk to whoever she needs to talk to.

The reason for the delay flows from what the Supreme Court has recognized. Abortion is a unique act. It's not like anything else. The Supreme Court went on to say that

the idea that important decisions will be more involved and deliberate if they follow some period of reflection doesn't strike us as unreasonable, particularly when the statute directs that important information becomes part of the background of the decision.

That's certainly the case here. South Dakota's statute certainly fits that description. There will be important information that becomes a part of the background of her decision.

It might be the first time that the woman has ever heard the statement that the abortion is going to terminate the life of a whole separate, unique, living, human being, a member of the species Homo sapiens. That's something to think about for a day, two days, three days, perhaps even more, but three days is what the statute allows.

It's probably the first time she's ever really thought about the medical implications of an abortion. It's unlikely, and Planned Parenthood doesn't suggest to the contrary, unlikely very many women independently research it.

It may be the first time they ever heard about government information, assistance information that they may be able to get prenatal care, child birth care, neonatal care, all that kinds of care from the Federal government.

It may be the first time she ever finds out her boyfriend, her hypothetical boyfriend is financially responsible for the child.

There is a lot. If the remainder of the Bill goes into effect, there will be other information. She'll get a more complete risk factors analysis from the doctor, get a coercion assessment from the doctor, get more assistance information from the PHC, and an opportunity for a coercion assessment from the pregnancy help center.

It's substantial information, as Planned Parenthood pointed out, but it's substantial for the reason that this is a unique act, because it involves not only the woman, but the unborn child. That is a fact that has -- that explains why the Supreme Court's approach to abortion is different than a lot of things, because it's not just the woman. It's the woman and the unborn child. This is a larger act than simply a woman's decision. That combination of factors, we think, justifies the three-day delay.

There are other things, other analogs we think are applicable. The best analog to abortion is termination by a Court Order of a person's right to their child. You can't even file until five days after the child is born. You get 15 days. According to the statute, the counselor can wait 15 days before the counseling session. You have

to have a hearing before the Court. You look at those numbers in the statute, and you are easily talking about 30 days in the typical case.

THE COURT: With regard to termination of parental rights, there's no deadline upon which you can't any longer terminate your parental rights. Is there?

MR. GUHIN: No, there's not.

THE COURT: So there's no urgency, whereas with regard to an abortion in South Dakota, you can only get it during a first very short period of time.

MR. GUHIN: That is the difference. I would not identify adoption as the exact analog. There is no exact analog to abortion, because there's no other procedure in which one person is allowed to take the life of another human being. So it is different. But there are enough similarities which indicate that the end of the woman's rights occurs only after counseling, only after you take an extended period of time for counseling. There's no way you can compress that adoption stuff into three days. That is what the South Dakota Legislature is saying has to happen in the abortion context.

So we think the South Dakota Legislature has taken notice of the differences between abortion and adoption and demanded all of this take place within the three-day period, unlike adoption which might take 30 days or might

take much more, as the Court indicates.

THE COURT: Mr. Guhin, there's a difference between the Plaintiffs and the Defendants on whether the same physician has to provide the initial information and then be the one that performs the abortion later. The statute uses the word "the physician" throughout rather than "a physician." So isn't it reasonable for the Court to assume that they mean the same person for each of those two meetings?

MR. GUHIN: We don't take that view. The reason we don't take that view is there's no explicit command in the statute which demands the same doctor provide those services. The Legislature knows how to demand things, and certainly does know how to demand things in this particular context. But it does not demand that here.

It does seem to us that when you get to Section 4, it says no doctor can perform the abortion unless such and such happens. That's sort of a generic kind of deal. The world of doctors can't perform it, so it doesn't refer back to just the one doctor. We don't see that affirmative command in the statute.

Another point is --

THE COURT: The Legislature also knows how to choose words, and in the first section, Parenthetical No. 2, they use "a physician," whereas in the Section 3 where

they are adding a new Section 3, they use the word "the physician."

MR. GUHIN: Your Honor, in response to that, I guess I would say if there is some ambiguity as to how the statute should be read, it obviously should be read to be unconstitutional. The constitutional reading is required by the later cases, Gonzales v. Carhart, and Ayotte.

There's another point here that I think is significant, and that is in the end Planned Parenthood hasn't shown it's going to make any difference. Planned Parenthood hasn't quantified what difference it will make because the same doctor isn't available every week.

So what has Planned Parenthood said? One doctor will come -- in Paragraph 17 of Dr. Ball's Affidavit, she says, "One doctor comes to Planned Parenthood three times a month." Okay. Let's just take that as a given for the purpose of this discussion, anyway.

So if there's a same-doctor requirement, assume that's the case, most of Planned Parenthood's patients will probably be able to see that doctor the next week or at least in two weeks. We know most abortions in South Dakota occur between six and eight weeks, if you look at Page 82 of the vital statistics we put in Exhibit 5 of the DeVaney submission.

It doesn't look like there will be a problem for most

women.

Now, some smaller number come between 11 and 13 weeks. What do we know about those women? Well, we know that some of those women will have the same doctor. We can assume, I think we ought to assume that women are going to have some knowledge of the law, and may adjust their practices to accommodate the law. Everybody else has to. They do, too.

THE COURT: So you're assuming that the women have an understanding of the law, but they don't realize that the abortion is removing more than a tissue?

MR. GUHIN: Your Honor, what we know is that Planned Parenthood was telling women that much within a few years of right now, that there isn't as good of information as there should be.

THE COURT: But you think they understand the law?

MR. GUHIN: I think that the ability to communicate what the timing requirements are are much easier to communicate than the ability to communicate the nature of the unborn child. I think it's simply easier to communicate.

Women are much more likely to be able to pick that up easily than the really profoundly disturbing idea, disturbing because there are so many abortions, that the unborn is a human being, a member of the species Homo

sapiens. It's a harder concept to deal with. It's much more important, but much harder to deal with.

THE COURT: Your position is if the Act requires the same physician to do the initial consultation and the abortion procedure, that that has no practical impact?

MR. GUHIN: Our position is that Planned Parenthood has not shown the practical impact, and that the burden is a hundred percent on Planned Parenthood.

Planned Parenthood could have said, "Well, here are our statistics for the last three months or six months or five years. Here is what they show, and, Court and counsel, here they are. Take them for what they are." Didn't do it. They had three months to do it. It's their burden. They failed.

That doesn't fall on the state. That falls on Planned Parenthood. It is their burden entirely. They failed entirely. They just make a statement, "Well, this is going to hurt." Not enough. It certainly is not enough under Mazurek or Rounds.

We think the requirement is -- we think the statute is valid, whether or not you read it with or without a same-doctor requirement certainly on the record as it comes before this Court.

I would like to turn to the question of undue burden. It is our view that Planned Parenthood has, once again,

failed to make a clear showing by evidence greater than summary judgment that an undue burden is created by the two-visit, three-day delay. Undue burdens are rarely found. The Supreme Court has only found it in two situations, spousal notification and a very particular kind of partial-birth abortion.

The Supreme Court has found an undue burden is not simply a regulation that makes it harder to get an abortion or more expensive to get an abortion, but has the effect of putting a substantial obstacle in the path of the woman's choice. As our Brief pointed out, and as has been pointed out before, that may not be the most illuminating test.

The Eight Circuit, consequently, and other Courts, have gone to what the Supreme Court actually did. We believe that what the test that emerges is that an undue burden is created when a state regulation has the effect of preventing a large fraction of women affected by the regulation from obtaining abortions. The operative word there is "prevented."

In Casey, according to Casey, the spousal notice regulation was likely to prevent a significant number of women from obtaining abortion. A significant number of women were likely to be deterred from obtaining an abortion.

The Sixth Circuit talked about a woman being

effectively barred from obtaining an abortion. The Seventh Circuit found an undue burden created when the regulation actually prevents women from having abortions. The Eighth Circuit says the same thing.

The Eighth Circuit is very interesting. The single-parent notification was struck down, single-parent notification without a judicial bypass was struck down. It was struck down because of the precise analogy to spousal notification. They couldn't get the abortion after giving it, so they wouldn't give it. That's what all the statements in there.

The Eighth Circuit is saying these young women are not going to be able to get abortions. They are going to be prevented from getting abortions. Some minors, an abortion would be in their best interest, but she could not qualify for the abuse exception. Therefore, they are obviously implying she could not get an abortion. Many minors who are abused could not use the abuse exception for fear of discovery. They're prevented from getting an abortion. The whole list of what they talk about there. All of these young women are prevented from getting an abortion. That's what Casey is about.

How many prevented? That's the second part of the deal. You get to the equation, two parts to the question. First, what's the group of women who are affected?

Secondly, what's a large fraction of that group?

Well, there have been Courts that have dealt with numbers in this. Twelve percent was not enough for the Seventh Circuit in Taft. Ten percent was not enough for the Seventh Circuit in A Woman's Choice, which I point out that Planned Parenthood has misread at Note 17 of their Reply Brief. They read it exactly opposite of what it actually says. Fourteen percent was not enough in Tucson's Women's Center. A hundred percent is enough. That tells us, maybe not too helpfully, that the number is somewhere between 14 and 100 percent.

We look at the phrase itself. It's a rather mathematical phrase, and the Courts say it should be taken at face value. It's clearly deliberate. It uses ordinary terms. Uses the word "large." The word "large" can be contrasted with the word "medium" and "small." We take from that that "large" means something over 50 percent.

THE COURT: But it doesn't use the term "majority." Does it?

MR. GUHIN: It does not. It does not, Your Honor. It uses the word "large fraction."

THE COURT: "Majority" would have been clearer if they wanted over 50 percent.

MR. GUHIN: That's true. There are ways in which the Supreme Court could have made Casey more clear. I

certainly agree with that, Your Honor.

But we think the use of the term "large fraction" does convey something -- does convey that that fraction, that the numbers can't be small. They have to be large. They can't be small. That's what the phrase says.

So how does the rule work in South Dakota? The group affected is all women. That's what Planned Parenthood says. On Page 46 of its Brief it says, "All of Plaintiffs' patients would have to make two trips to the Sioux Falls Health Center at least 72 hours apart."

So the critical question is has Planned Parenthood shown a large fraction of all its women clients would be prevented from obtaining an abortion? The answer is clearly no. They don't even allege it. They didn't allege it in their first Brief of 19,984 words. They didn't allege it in their Reply Brief. They don't even allege it this afternoon.

What they say is that, well, Casey in the Eighth Circuit, they actually have relied on the concept of large fraction, but actually this phrase is simply obiter dictum. They really want this Court to say something like large fraction, as used in Casey in the Eighth Circuit, has no meaning. We just think that's impermissible. The Supreme Court meant something genuine, real, and put a requirement on the lower Courts to employ the large fraction idea.

If you look at Page 26 and 27 of their Brief, what they seem to say is what you do is you look at the burdens on women with the fewest financial resources and the other burdens, and then it's inescapable that South Dakota's laws constitute a substantial obstacle. This is no rule at all. This is I know it when I see it. Of course that was never a rule in obscenity law. It's not a rule in abortion law. Of course it can't be a rule at all. There's nothing there doctrine-wise.

The essential point I think I'm trying to make here is the burden is on Planned Parenthood to make the clear showing that it's likely to succeed. It simply can't do that without setting out an intelligible legal rule. It has not done that.

Another way to look at what Planned Parenthood is saying today, if you accept their what I think is their implicit argument, although I'm still not sure what their argument is, that if you compare Casey and the facts at issue, then some result emerges. Even in that case, still Planned Parenthood can't show that the burdens in this case are significantly greater than burdens in Casey or in other cases.

In fact, one of the amazing things about this case is if you look at the Affidavits and the language Planned Parenthood uses in its own Brief, how eerily similar it is

to the District Court Opinion in Casey, the one that the Supreme Court reviewed. Practically the same thing.

The facts in Casey, ostensibly there was a two-trip, 24-hour delay statute. In fact, the District Court found the actual delays for most women would be two days to three weeks, well within the range of what we're talking about here this morning. In all cases there would be two trips. In some cases there would be 300 miles one way. It would be 1,200 miles to get an abortion for two trips.

It would be particularly burdensome for women with the fewest financial resources. There was substantial discussion about that in the District Court decision in Casey, in my recollection. The Supreme Court -- neither the Supreme Court, nor the District Court, ignored that point.

The problem of battered women was emphasized by the District Court and then decided by the United States Supreme Court. Particularly burdensome for women who don't have sick leave who live in rural areas.

The same kinds of things, almost the same phrases, in many cases the same phrases that Planned Parenthood uses in its Affidavits here today.

THE COURT: Does Pennsylvania have second-trimester abortions available?

MR. GUHIN: I don't recall. I don't recall,

Your Honor.

THE COURT: And if they do, isn't that different than here?

MR. GUHIN: Well, it would only make a difference if Planned Parenthood could show that a substantial number of people weren't able to get the first trimester abortion, but we're back to the problem, the proof problem that Planned Parenthood has. It just simply has not been able to show there are very many people in that class.

We know that some women in the 12th and 13th weeks do get abortions from Planned Parenthood, but we don't know how their coming to the clinic would be adjusted by the existence of this law. We don't know how many of those women would be able to get an abortion under the new law. They didn't set any of that out. It's not the job of the Court to do that. It's not my job. It's their job. They have failed in their burden of proof. If they want to make that proof, let them try. But they didn't. They have not even tried that. They simply made a bald allegation.

THE COURT: I think the facts in Casey indicated that Pennsylvania had multiple abortion doctors available within the state.

MR. GUHIN: It did. But in the end what it said was they were talking about 300-mile trips. They were talking about exactly the same kinds of problems here;

particularly burdensome for fewest financial resources; battered women; live in rural areas; can't get sick leave; want to hide their abortion from a significant other.

The Eubanks case looked at the question in the context of a 24-hour delay and said something that may be pertinent here. Delay makes the abortion marginally more difficult to obtain, but unlike spousal consent requirement, does not fundamentally alter any of the significantly preexisting burdens facing poor women who are distant from abortion providers.

The fact of the matter is this statute really doesn't make much difference with regard to the kind of burden that they're talking about. It already exists. That's the situation South Dakota confronts.

In the end, to us it's clear that Planned Parenthood failed to produce sufficient evidence or any evidence at all that a large fraction of all of its Sioux Falls clients would be prevented from having an abortion by the regulations we're talking about.

Andrea Adams talked about some women might be prevented from getting an abortion. A number of women, she talked about, were close to 13.6 weeks, but she doesn't specify how many, and she doesn't specify how this would happen. "A number of women" is completely without any value in making the kind of analysis to get to a large

fraction.

Lenore Walker used a phrase like "a woman" might be prevented from obtaining an abortion. Again, that doesn't help.

Misty Parrow said make it impossible for "some patients" to obtain an abortion. Well, that's not very helpful either. What does "some" mean? One out of a hundred? 10 out of 15? Who knows? We just don't know. They failed their burden to put on the evidence.

The second alternative, which they may be arguing, some effect less than prevention constitutes a fraction. Well, again, they don't identify what the large fraction is. They don't make any large fraction argument at all, so we, of course, say they've waived that.

And they don't identify how the burdens are different. How do they make that -- how do they distinguish the burdens in South Dakota from the burdens in Arizona and the burdens in Pennsylvania or the burdens in any other place that failed to find an undue burden? They simply don't do it.

Your Honor, if there aren't anymore questions on that subject, I would turn to the risk factors sections.

THE COURT: Sure.

MR. GUHIN: The idea of the risk factors assessment is the doctor will assess the woman who is

considering abortion for her individual risks, and then inform the woman about the risks which are relevant to her particular situation. The purpose is obviously to enhance the health of women, something everybody in this room ought to be able to agree on.

The risk factors assessment that's really at dispute here today is necessary so the patients can be properly informed about the risks relevant to their own unique circumstances. It's not a new deal. As a matter of fact, back in 1973, 38 years ago, Planned Parenthood researchers said, "I can identify and I have identified characteristics that are going to make it difficult for certain classes of people after their abortions." Let's see, identified low self-esteem, high alienation, delay in seeking abortion. It said, "If we did a test for these people, then we could help them out after their abortions."

This is back 38 years ago Planned Parenthood had this information. A test was identified, and a test could have been taken for a dollar a patient. Planned Parenthood failed to adopt that. Well, here we are 38 years later. There's much more research.

Dr. Calhoun and Dr. Shuping testified that both pro-life and pro-abortion researchers agree on more things which will affect women after their abortions. Coercion? If a woman is coerced, she's likely going to have a bad

effect after the abortion. Wantedness of the child; whether the woman expects to be able to cope adequately; whether she feels guilt or doesn't feel guilt; whether she has ambivalence. Some examples of things.

So the purpose is to identify the risk factors that are going to apply to particular women. Planned Parenthood says this risk factor statute has been before the District Court in Nebraska and Nebraska struck it down, so the South Dakota Legislature must have had a bad purpose when it adopted it. But, in fact, Nebraska didn't defend its statute by expert testimony. South Dakota is defending it. South Dakota is vigorously defending it. That provision never had a fair chance. It won't have a fair chance without some expert testimony behind it. We're giving it to it.

Planned Parenthood argues that it's impossible to do what the statute implies. Here is what I understand from what Planned Parenthood tells us in its own Affidavits. The forms that Planned Parenthood in Sioux Falls uses today, and are going to use tomorrow, are prepared by National Planned Parenthood. They can't be changed by these folks in Sioux Falls. The forms prepared by National Planned Parenthood already list medical risks. There's a checklist. They go down that checklist with the women.

What National Planned Parenthood will have to do is

they'll have to prepare another form of related psychological risks. They'll have to create a second checklist. It's particularly appropriate, we think, as it happens here, that the nation's largest provider of abortions should be doing so, and particularly inappropriate that they should protest against doing it. They have the resources, $30 million income apparently last year. They are the nation's largest provider of abortions. They are the natural candidate to do this.

And as it happens, they come to this Court as Plaintiffs demanding that they not be required to do that. What do they claim? They claim there's too much literature to research. Well, the basic research can be done, as we know, in a portion of an instant, a tenth of a second, fifteenth of a second.

Then they say not all journals can be searched electronically. It seems to us that the reasonable reading of the statute is you can do the whole deal electronically. You can search by fields. You can return by the electronic means, get the text, look at the text. That's really the only reasonable reading of this statute.

Planned Parenthood says, well, we don't know how to frame an adequate search for the effects of abortion. I'll back up a little bit and look at this allegation. It is truly amazing. Again, this is the nation's largest

provider of abortions. I don't know, a million? They ought to know, number one. Number two, I think they told us they are the most knowledgeable about abortions. What does that mean? They must have access to this information. They must have already done it.

Dr. Calhoun, at Paragraph 28 of his Affidavit, says a computer-assisted search can be effectively constructed, automatically updated to provide a systematized screening of risk factors identified in the scientific literature, in addition to examining systematic reviews, metaanalysis, and other research.

There's strong evidence that Planned Parenthood ought to be able to do this. "Well, we're going to get too many documents," Planned Parenthood says. I think their bottom line was something like 3,500 documents. Let's say that's true. Well, I'm not sure that's a lot different than any individual lawsuit that's been in our offices or their offices or perhaps even before this Court. We get a lot of documents in these cases. They have to be analyzed. They have to be dealt with.

Again, this is Planned Parenthood. Planned Parenthood should know about most of these documents walking in. They have been doing these studies, we were told, anyway. How can they avoid the obligation to know about these studies?

The final thing they claim is they're forced to convey

untruthful and misleading information. In their Briefs they get to the breast cancer controversy. They say they shouldn't have to talk about that at all. But, in fact, this is going to be a useful sort of exercise. There is information on the Internet and other easily accessible places that there is an association of maybe causation between abortion and breast cancer. Is that true or not true?

Well, women know about this. They know about the other things people say about abortion, because abortion is a hot item. So when there's a side effect or alleged side effect, that will make the news. It may not make the news for some disease that I have. But it will make the news with regard to abortion.

So it's a good idea if the doctors say, well, here is the deal on abortion. Here is the deal on breast cancer and abortion. I've seen the studies. These studies don't work. Planned Parenthood doctors and most doctors -- this is what they actually believe. Most doctors don't believe X, Y, and Z have anything to do with it. Now let's go on to other stuff. That's all they have to do there. If they don't believe it, they don't have to say abortion causes breast cancer.

THE COURT: But under that section of the statute, it says that the doctor is supposed to disclose

any of the information that's statistical information that's been published after 1972 and at least one peer-reviewed journal, and as we know, medicine and findings change quite a bit. The statute would require to disclose things that from '72 to '80 fit that definition of being in a peer-reviewed journal, and they may have been discredited after that. So if it's been discredited, isn't it untruthful or misleading?

MR. GUHIN: The only obligation, if there's sort of a generic class like that, a doctor can certainly say researchers used to think X, Y, and Z. Researchers don't think that anymore. Researchers now think A, B, and C. That's really all it has to go on. It doesn't have to say what researchers thought in 1975 or 1980 is correct if they don't believe that today.

THE COURT: If the purpose is to make the woman informed of truthful information, why do you have to disclose something that is no longer considered to be truthful?

MR. GUHIN: I think because of the nature of abortion, because abortion is so highly publicized. I think the breast cancer thing is just a perfect example. That story is out there. Many women believe that abortion is connected to breast cancer. Breast cancer and abortion are together. It's a good idea for the doctor to confront

that. He can confront groups of things like that at one time, if he wants to, if he can do it reasonably, and I imagine he can.

I think what Planned Parenthood's approach here is extremely unimaginative. They simply have not -- they tried to construct ways to make it just awfully difficult for them to do, but they really don't have to do it that way. They can talk about doctors used to think A, B, and C were associated with abortion. We don't think that anymore. We think other things. They can do that in classes. They don't have to go into any detail on that. So in that respect I think it's useful.

Whether or not this would work for something else, I don't know. I do know that because a special category of abortion, and it's highly publicized, a highly emotional aspect, it makes much more sense here than it might somewhere else.

That concludes my presentation. Ms. DeVaney will finish up.

THE COURT: Thank you.

MS. DeVANEY: Thank you. May it please the Court and counsel. In addressing the two provisions that are remaining, the pregnancy help center consultation requirement and the coercion assessment requirement, I'd like to go back to a question that the Court asked the

other counsel about whether or not any of these provisions at issue have ever been enacted or addressed by other states.

My answer to that is slightly different in that the information that is at issue with regard to the pregnancy help center consultation requirement is nothing new. It's information that has been addressed for years by the Courts with regard to informed consent for abortion, information about resources, and information about coercion. So those aren't new concepts that have never been addressed before by the Court.

What is new is the structural mechanism that the State has chosen in which to carry out those objectives, that being a pregnancy help center.

THE COURT: Just to be clear, there's no other state statute that requires women to actually go to a different location, to a pregnancy help center, and consult with them before she's able to get an abortion. Correct?

MS. DeVANEY: Not that I'm aware of, Your Honor.

THE COURT: Okay.

MS. DeVANEY: So when you consider it in that fashion, I think the first thing the Court should do is first look at is what is actually required by the Act. What does the pregnancy help center requirement consist of, and what does it not consist of?

When you look at the Act itself, it requires two things and only two things. It requires that the woman go to the pregnancy help center to receive information about the resources, the education, the assistance that is available to her to assist her in carrying a child to term.

The second thing that it requires is the opportunity for her and the opportunity for the pregnancy help center to interview her about her circumstances in order to try to determine whether or not her decision is subject to coercion.

But the statute itself does not require her to disclose personal circumstances that she does not wish to disclose. It does allow the pregnancy help center counselor to ask her questions, presumably. That's the interview language. But there's nothing in the Act that requires her to disclose anything, if she chooses not to.

THE COURT: Well, she has to tell them she's seeking an abortion.

MS. DeVANEY: Yes. Well, it really boils down to two things which are part of the scheduling appointment that she makes when she visits there. Obviously she's pregnant. That will be revealed, otherwise she wouldn't be there, and that she has sought an abortion, because that's the reason why she's required to go to the pregnancy help center. Two facts that she's already had to disclose to

the abortion providers.

But beyond that, it's her choice, and the most reasonable --

THE COURT: Except the statute says she must consult at a pregnancy help center.

MS. DeVANEY: Yes. But when you look at what the consultation requires in the Act, it's those two things. She needs to hear the information, be provided the information about the resources and the assistance that are available, and then have the pregnancy help center interview her about whether or not she's coerced. If she does not want to volunteer or offer any information about her pregnancy or the circumstances surrounding that, the Act itself does not mandate that she do that.

THE COURT: But it says that she has to have a private interview to discuss her circumstances. Don't you think a reasonable interpretation of that is that she has to describe her circumstances?

MS. DeVANEY: No. And the reason I don't is when you look at the rest of the statute in totality, the coercion assessment is not a mandatory component of the abortion process.

THE COURT: Why does it use the word "must" and "shall"?

MS. DeVANEY: You are looking at Subsection 3,

Your Honor?

THE COURT: 3(a).

MS. DeVANEY: It says she "shall." "The pregnancy help center shall inform her about what education, counseling, and other assistance is available."

THE COURT: And she "must" have a consultation. Those both sound like mandatory words to me.

MS. DeVANEY: Are you looking at Subsection 6?

THE COURT: 3(a). "That prior to the day of any scheduled abortion, the pregnant mother must have a consultation."

MS. DeVANEY: Right. Well, it's clear she must go to a pregnancy help center. It's clear they shall inform her --

THE COURT: And she "must have a consultation" is what it says. Not that she just goes there. That she must have a consultation.

MS. DeVANEY: Well, Your Honor, I would submit to you that a reasonable interpretation of the statute, an interpretation that the Court must apply in terms of attempting to save the constitutionality of the statute, when you read that, it suggests that the pregnancy help center may certainly conduct an interview, is the words they're using, but nothing in here requires her to tell them anything.

If you look in conjunction with what then follows from that, it would be different if the woman could not go back to the abortion provider and get an abortion if she did not come back with an assessment from the pregnancy help center that says, "We have talked to her, and we have determined there is no coercion here present." But that's not what the statutory scheme requires.

They may, and that's certainly not a mandatory term, do some sort of written provision, written assessment of that discussion, and provide it to the abortion provider, but they're not required to.

Similarly, when you look at what she is then required to do when she goes back to the abortion provider --

THE COURT: But she doesn't have the option to just not go.

MS. DeVANEY: She has to go.

THE COURT: Right. She's required to go.

MS. DeVANEY: That's clear from the statute. I don't dispute that. But when she goes back to the abortion provider, all she has to do is say that she has been to the pregnancy help center, if I can find the actual provisions, and certify that she has been there. That's the end of it. If you look even at the legislative sponsors, I think that's what was contemplated in terms of what is being required here, because there was some discussion about that

in the debates before the Legislature when this was passed.

So if she doesn't have to certify -- I think what I had written down that Plaintiffs' counsel said, when talking about this provision, is that the interview must be sufficient to determine if coercion is present. Nowhere in the statute are those terms.

There's nothing in here that says this interview, the result of it must be sufficient in order to make this coercion assessment. The coercion assessment is not a mandatory thing in the scheme of the statute.

So the most constitutionally reasonable construction of this provision is that this is an opportunity for her to go and have this discussion about coercion, but she does not have to disclose anything, other than, as you said and pointed out, and as we've conceded in our Brief, the basic facts that she is pregnant and that she has sought an abortion.

That leads to the question of why this approach? Why did the Legislature choose to use this structural mechanism in order to accomplish these goals, rather than, as the Plaintiff suggests, just letting the abortion providers continue to fulfill or attempt to carry out these objectives?

The reason is because there has been a demonstrated record that they have failed to do that. I think that

stems from the fact that there's a fundamentally different approach that the abortion providers have in comparison to, for example, the pregnancy help centers. That becomes apparent in numerous places throughout their Brief where they keep referring to a statement where they say, "They are forced to go to another entity that is opposed to their decision."

That's precisely the problem, Your Honor. The abortion providers have in the past and continue to abide by the notion that the woman's decision is already made up at the time she calls the clinic to schedule the abortion, which totally defeats the whole point of the informed consent process. If you assume her decision is made up by the time she calls the clinic to schedule an abortion, then what's the point of doing any informed consent?

When you look at the current practice of what information --

THE COURT: Well, Mr. Guhin argued that the women that are seeking an abortion are very well-informed of the law, and they understand what a three-day waiting period would be, and that they can conform their schedule so that they meet all of those requirements. So why do you think women wouldn't have done research on --

MS. DeVANEY: My understanding, Your Honor, when he said they were informed was specifically with regard to

the three-day waiting requirement. That's a far different question than all the other information that they are supposed to receive during the informed consent process after they go to the abortion provider. That was my understanding of his comment, that that pertained to the three-day delay once there has been -- this has already been publicized about a new law requiring a three-day delay, that that's a concept that can be grasped and that women can know about, which is different from --

THE COURT: Hasn't it also been publicized that there are pregnancy help centers, and if that's what they wanted to find was help to deal with their pregnancy, wouldn't they be able to make that choice on their own and find the information and get to a pregnancy help center?

MS. DeVANEY: Ideally that would be good if that was, in fact, happening. The problem is, it's not. Here is why. When they call the abortion -- call the abortion clinic to schedule their abortion, the only thing they're told under the current practice, and I'm reading from the telephone script, which is my understanding based on our previous litigation and the discovery that was conducted as far as how they receive the resource information. This was attached to the Declaration, and it was Ball Deposition Exhibit 4.

What happens now is they call the abortion clinic to

schedule an appointment, and they are read a recorded script. I don't know if this part is recorded, but it's a script that is written down. The script says, "I am required to inform you that Medicaid benefits may be available to you for prenatal care, childbirth, and neonatal care." That's it.

First of all, the use of "Medicaid" specifically is not in the statute. The statute refers to medical assistance and benefits. It's somewhat broader than that. But I guess that's beside the point.

What I'm trying to suggest is this is the sole limited sentence that women hear currently about resources that are available when she calls to schedule an abortion. That's it. Unless when she goes to the clinic, she happens to specifically ask for more information, and then only the small percentage of patients that might do that might get some additional information from Planned Parenthood.

But Planned Parenthood is not the expert in pregnancy resources for carrying a child to term. The pregnancy help centers are the ones that have that information and have been in existence for many years for precisely that function.

So it was a reasonable and rational decision for the Legislature, in order to remedy this defective current structural mechanism that isn't working because the

information isn't getting to enough women about what resources are available prior to them making their decision, to require them to go to the pregnancy help center and actually get the information in writing, verbally, from the people who are expert in helping women in these situations before they make their decision.

THE COURT: So in the United States Supreme Court Opinion of Hill, the Court recognized that there's a broader right to be left alone, and that women that are going to get an abortion don't need to have their sensibilities bombarded on their way into the abortion clinic. How would you distinguish Hill from here?

MS. DeVANEY: Hill was a case where the First Amendment rights of the speaker were at issue, and that was what the Court was addressing. There was some dicta in that case where the Court recognized the privacy interest that someone receiving medical care might have in, as you stated, from being bombarded with that type of information.

But it was not a case where a requirement such as this, where the requirement to go in a limited context in which this Act requires it, to receive this information. So it isn't controlling as far as the issue that's before the Court here.

THE COURT: If the person goes to the pregnancy help center, they're not able to just avert their eyes

because they're required to be there. Go ahead.

MS. DeVANEY: First off, I think we need to distinguish the type of activity we're talking about in the Hill case and cases like Madsen, where you're dealing with sidewalk protestors, leaflets, that sort of thing, when you are dealing with type of information that was likely being provided to those women or those people at issue, as opposed to the limited information, again, we have to go back to the Act and look at solely what this Act requires.

Plaintiffs' argument seems to be centered around the notion they're assuming all of this stuff that's going to be happening that's not. They're going to be giving them these anti-abortion messages, improper information or inaccurate information about abortion or medical risks and that sort of thing, when that's not what the Act requires.

The Act only requires them to talk about resources available if they decide to carry their pregnancy to term.

THE COURT: Does the Act limit what information will be provided? I mean you are talking about what is required. Is there any limit on what can be disclosed, other than they can't talk about religion?

MS. DeVANEY: That was one that I was going to mention. It specifically prohibits them from discussing religion. A component of that may be some of the concern with the anti-abortion information that may have been at

issue with the Hill sidewalk protestors.

THE COURT: But the fact that you can't talk about religion doesn't mean that you can't discuss anti-abortion philosophy. Does it?

MS. DeVANEY: Well, but this is a facial challenge as to what the Act requires, and the Act doesn't require that. Then the Court is engaging in the type of speculation that was prohibited in cases like Grange, for example, which directed Courts to not assume that things were going to happen as a result of a statutory requirement when it hasn't even gone into effect.

So in a facial challenge I think the Court must rule based on only what is required in the Act, not on some assumption or speculation that the pregnancy help centers are going to go beyond that directive.

The other thing I think you can properly take into account here, and should, are the policies that the pregnancy help centers that have registered thus far have enacted. I don't know if the Court has had a chance to take a look at them.

But they specifically prohibit -- they have two different procedures set up for dealing with women that come to the clinic because of this specific Bill's directive versus other women that walk in the door that have not been to an abortion clinic and are coming there

because they are required to do so.

THE COURT: And at this point there are three clinics that have registered?

MS. DeVANEY: To my knowledge, yes, Your Honor.

THE COURT: There may be more that register that end up having different policies?

MS. DeVANEY: At this point, again, we don't know that.

THE COURT: But how can I rely on the three that have registered and their policies? Because they could change their policies tomorrow.

MS. DeVANEY: Because that's the evidence before the Court. Again, it's assuming or speculating that something might happen that hasn't. All you can do is base your decision on what evidence is before the Court, and that is that they have enacted a policy which strictly prohibits them from discussing anything other than these two specific topics that are required by the statute and prohibits them from going beyond that to talk about the abortion procedure itself or medical risks of abortions and those sort of things that the Plaintiffs have raised concerns about.

THE COURT: Out of the three pregnancy help centers that have signed up, one of them is here in Sioux Falls. One of them is 350 miles away in Rapid City.

The other one is probably 400 miles away. Correct?

MS. DeVANEY: As far as I know, Your Honor, that's correct.

THE COURT: So if a woman wanted to utilize the services of a place, other than the Alpha Center here in Sioux Falls, that would require them to drive 350 miles to 400 miles to one of the other two pregnancy help centers that are located -- or that are listed?

MS. DeVANEY: I think not necessarily. The Alpha Center in their policies, if you look at those, they also have affiliations with numerous physicians located throughout the state, which it's my understanding is they are available and would be available to carry out the counseling required under this 1217 provision.

I think as a practical matter, it's most likely going to be the Alpha Center that will be handling the bulk of this, because they are the ones that are located here in Sioux Falls. If a woman is informed at the time she calls to make her appointment at the abortion clinic, that part of the requirement under the law is that she obtain a consultation at a pregnancy help center. She can schedule that appointment at the same time that she's going to come here to have her initial consultation with the abortion doctor. So it can be carried out at the same time that the initial consultation is carried out there.

So in that respect, as a practical matter, I don't think it will cause an additional significant burden.

Back to then I guess what the framework of the arguments and the specific legal challenges that the Plaintiff has made with regard to this requirement, it's important to keep in mind the directive in Casey. That directive is that the right to choose an abortion is not a right to be insulated from all others in doing so.

Casey recognized that the state is allowed to adopt structural mechanisms in order to get the message out to women, even if it is a message that encourages carrying a child to term over abortion. The State is allowed to do that under the Casey framework. If the abortion providers have demonstrated that they have not --

THE COURT: But in Casey, the information the State was giving to women wasn't face to face. Was it? Wasn't it literature?

MS. DeVANEY: There it was literature. That's correct. That's what I said earlier, Judge. The information here we're talking about isn't any different, the information that is being required. What is different is the structural mechanism in which the State has chosen to carry it out.

THE COURT: But isn't the difference with literature and a face-to-face meeting, that with literature

you can effectively avert your eyes by just putting the literature down without reading it?

MS. DeVANEY: You can. But that is also -- I think that's precisely the point, precisely the objective why the in-person visit was required, because the message wasn't getting out, and Casey did not recognize or did not hold that the woman has the unwilling listener right to not hear this information. That has been rejected by Casey in the Court upholding the requirement of that information.

There have been other Courts since Casey that have looked at provisions in which, instead of just offering the written materials to the woman, the woman was mandated to take the actual materials. Those were two other District Court cases, I believe, that upheld those requirements; Karlin v. Foust was one of them; Summit Medical Center v. Riley. So the whole unwilling listener argument --

THE COURT: But there's never been an instance where it's been upheld, where they were mandated to sit and listen to the information. Was there?

MS. DeVANEY: It's not been presented to a Court, as far as I know. I think as Mr. Guhin pointed out, that in itself doesn't mean the requirement can't be upheld, just because it's a new approach. It still must be analyzed under the rationale that was employed in the Casey cases and subsequent cases that upheld requirements that

that type of information be delivered.

Also in our Brief we pointed out the Department of Health statistics which show that the vast majority of the women aren't availing themselves of the opportunity to access this information when they are read this recorded -- this script on the telephone when they call in to get the information about resources.

So it's a reasonable, rational decision for the Legislature to try a new approach in order to ensure that she does actually see the information and hear the information before she goes on to make her decision.

The Plaintiffs attempt to characterize the pregnancy help center consultation requirement as a compelled speech issue. It's not. For the reasons we explained earlier, it does not compel specific speech, unlike the cases that the Plaintiffs rely upon in their Brief.

Why are they attempting to characterize this as a First Amendment issue? Because they want those strict scrutiny standards to be triggered. Because if they don't, they can't meet their burden. If it's analyzed as a straight privacy issue and an undue burden issue, which I'll get to in a minute, then the State's reasoned and rational legislative determination will prevail.

When you look at the statements that deal with compelled speech, and I think the one the Plaintiffs rely

the most heavily on, because it's the only thing that comes close to the type of speech that is required in this case, which is very minimal, as I explained, the State's interpretation and the interpretation we urge the Court to adopt, which is that the woman does not have to disclose any private or personal circumstances that she does not wish to disclose.

So we're really just talking about her revealing that she's pregnant and has sought an abortion when she schedules her appointment there. That is the type of speech which does not trigger First Amendment strict scrutiny. Plaintiffs seem to be operating under the notion that whenever speech is compelled, that First Amendment strict scrutiny standards must apply.

Even in abortion cases, and the perfect example is Rounds that we just dealt with. Both Rounds and Casey where doctors were compelled to give certain information, the Court specifically ruled out applying that strict scrutiny standard. Rounds at Page 734 stated that if those First Amendment concerns aren't triggered, then there is no need to go into the strict scrutiny analysis.

When you look at what the woman is actually required to do here, we do submit this is a regulation of conduct, not of speech. She is being required to go to the pregnancy help center. That is clear. But regulating her

conduct, and her conduct is seeking an abortion, which the State is entitled to regulate. What this really is is a concern about privacy and the concern about whether or not that constitutes an undue burden.

So when you turn to it and analyze it in that fashion, that brings us to -- before I get there, I would like to respond briefly. The Plaintiff suggested in their Reply Brief that the State has conceded that even if a strict scrutiny standard would apply, if the Court would determine this was compelled speech, that the State could not meet that. We didn't concede that. We never conceded that in the Brief.

The State does have a compelling interest in ensuring that a woman's decision is well-informed and in promoting the rights of the unborn. Casey didn't analyze the speech at issue in that case under the strict scrutiny standard, so the fact that they may not have used the word "compelling" does not mean that the Court cannot find those interests to be compelling.

Casey determined that the strict scrutiny standard didn't apply to the speech at issue in that case. It is narrowly tailored, because there are only very minimal things she's required to disclose, and that's that she's pregnant and has sought an abortion.

The other available means allowing the pregnancy help

centers to carry out these objectives have not proven effective. That's why the State and the Legislature has determined using the pregnancy help center is necessary to obtain those objectives.

Moving on then to the informational privacy claims. I think the most pertinent case at issue that lays out the standards to apply is the Whalen case, which has been discussed here. As I stated earlier, we were talking about the Hill case.

I think the Plaintiffs' argument assumes a couple things that can't necessarily be assumed. One is that all prospective women who have called an abortion clinic seeking an abortion want to desperately avoid the pregnancy help centers.

The testimony of the women before the Legislature suggest that is not the case. The Legislature heard testimony of women who were begging for an ear to listen more carefully to what they had to say, women that felt they were being coerced, and that they were basically being rushed through this process at the abortion clinic.

So we can't just assume everybody who has called the Planned Parenthood Clinic to schedule an abortion is very adamantly opposed to going to a pregnancy help center. Now, there certainly may be some women, but we certainly can't assume all women or even a large fraction of women

would be opposed to that requirement.

It also -- they are also assuming, as I mentioned earlier, that the pregnancy help center consultations will go beyond what the statute requires in the terms of the type of information and discussions that are held there.

When you apply the Whalen balancing test, if that's the appropriate way to characterize it, it's essentially a totality, I would call it, a totality of the circumstances test. To look first at what the Government interest is, and here it's clearly a strong and compelling interest in ensuring informed consent for abortion, and promoting the life of the unborn.

Then you look at the privacy provisions that are in place and determine whether or not they are adequate to secure that private information. First off, the obvious thing is that the Act itself prohibits the pregnancy help centers from disclosing this information.

THE COURT: But if they do disclose the information, there's nothing in the statute that would penalize them in any manner. Is there?

MS. DeVANEY: Not in this specific statute, Your Honor, no.

THE COURT: Is there a different statute that would penalize them?

MS. DeVANEY: I'm not aware of a criminal statute

that would apply. There may very well be licensing provisions. This actually reminds me of another point.

The Plaintiffs are assuming there will be no licensed personnel conducting these counseling sessions at the pregnancy help center, when, in fact, that is also not the case. The policies of the pregnancy help centers require it to be done by the licensed counselors they have on staff.

The only reason they would not be is if somebody wasn't available in order to carry out the mandate in a more expeditious manner than a client advocate with a certain amount of training can conduct it. I kind of digressed away from your question.

For the licensed people that are doing the counseling, there may be licensing sanctions that we submit could be triggered in the event of a confidentiality or privacy breach. There may also be civil liability against those individuals as a result of such a breach.

THE COURT: There's no civil liability against the pregnancy help center itself, though?

MR. DeVANEY: Not as a result of the Act. Whether or not there could be some other type of legal remedies against the center, I think is a question that I don't know if I have a clear answer to that. But I think certainly the individuals conducting the counseling could

be held accountable.

When you look at the cases in which Courts have addressed these issue, one of them is Whalen. There were two other Federal, not Supreme Court cases, but two other Courts. It was the Tucson case and the Ft. Wayne case the Plaintiffs discussed in their Briefs. There are some distinctions there I would like to point out to the Court.

When you look at the Whalen case, there you have the requirement that people's prescription information be duplicated in triplicate, and all of those forms be provided to the State Department to oversee to assist with this investigative function. There you are talking about 17 state employees and 24 investigators that the Court mentioned having access to this information. It was identifying information, of course.

Here when you look at what is happening at the pregnancy help center, first of all, that information, whatever information is obtained at the pregnancy help center is not shared with any State government agency. The only way anything is going to end up in the hands of a State agency is if a doctor decides to send over this discretionary coercion assessment to the abortion provider.

If that happens, then all the confidentiality provisions in Chapter 34-23A are triggered. All of those provisions have language in those statutes that require

them to use nonidentifying patient numbers or nonidentifying patient information that goes to the Department of Health. So we don't have that concern about patient identifying information, at least with regard to this large dissemination to a group of people.

The Plaintiffs keep referring to the pregnancy help center counselor as a member of the public. Your Honor, I think it's just completely unfounded to suggest that a private interview with one counselor at a pregnancy help center is the equivalent of public dissemination, because it's not. It's being required to talk to one counselor at a pregnancy help center.

The pregnancy help center policies, again, if you refer to those, specifically require the only person at the center that will have their name will be the counselor that meets with the woman, and the executive director, and that that information is secured, locked away, and nobody else has access to it. Anything else they obtain will be kept in files with, again, a number rather than a name.

In the Tucson case the Court was concerned about -- there were two ways of disclosure that the Court found to be concerning. One was, again, this access to the Department of Health employees, and, again, that was patient-identifying information, which we don't have at issue here. The other thing was the fact that a private

contractor would review all of their ultrasounds which had patient-identifying information. There were not sufficient safeguards with regard to the private contractor in terms of how that material was going to be handled or dealt with there.

So the Court in Tucson did look to the contract provisions of the private contractor in making this totality of the circumstances review of whether sufficient safeguards were necessary. The Plaintiffs seem to suggest that all of these things have to be mandated in the statute itself. But when other Courts have addressed this, they have looked beyond just the terms of the statute, and they've looked at the other things that are in play.

The Ft. Wayne case that the Plaintiffs cite had a provision in the statute that prohibited disclosure that was much more problematic than the one we are dealing with. In fact, it was kind of written in the reverse. What it said was that the information shall not be disclosed if otherwise prohibited by law, which then required you to go look for some other provisions in the law that prohibited the disclosure.

Whereas this Act says they may not release it unless it's in accordance with the law. So the Act itself prohibits the disclosure and clearly prohibits the disclosure, unless there are some other provisions of law

that require it to be disclosed. So that's a different provision than what was at issue in the Ft. Wayne case.

As the Court pointed out, there does not appear to be a criminal sanction with regard to this statute. There's also no criminal sanction in Chapter 34-23A for the confidentiality provisions that the abortion providers must abide by. There is also no criminal sanction for the confidentiality provisions in the adoption counseling statutes in Chapter 25-5A.

So if those provisions have not been struck because of confidentiality concerns, then there's no reason the Court should strike the provisions pertaining to the pregnancy help centers, because you would essentially have to assume that the counselor at the pregnancy help center is somehow less trustworthy and more apt to violate the law than a patient educator at the abortion clinic or the counselor counseling the woman giving up her child for adoption.

Whalen specifically says that the Court should not make those determinations based on speculation that somebody is going to violate a law that prohibits disclosure.

THE COURT: I'm not aware of any challenge being made to either of those provisions, where the Court refused to strike the statutes because of the confidentiality issue.

MS. DeVANEY: I'm not aware of that either, Judge, and I think the reason is because the rationale of those statutes is this is a benefit for the woman. That's the way the pregnancy help center requirement should be evaluated, instead of assuming that it's some burdensome requirement that all women would be adamantly opposed to.

It provides another tool to the abortion doctors in order to assist them in making this coercion assessment, which they are required to do, and are already required to do ethically.

Turning then to the undue burden claim. Those matters have been briefed. Essentially Plaintiffs make arguments that are based on hypothetical scenarios, speculations about how the pregnancy help centers are going to carry out the statutory mandate, which the Court is prohibited from relying upon under the Grange decision, for example. Again, there are a couple case references I'd like to respond to that the Plaintiffs made in their Reply Brief.

On the confidentiality concern, they refer to the Miller case and the Court striking down the parental-notice provision of that statute. In that case the disclosure that was being referred to there was the scenario where if the minor reported the abuse, and then the abortion provider was required to report the abuse to either law enforcement, the State's attorney, or some authority, then

inevitably the parent would find out about it once the abuse proceedings were instigated, because they're entitled to find out who filed the report. Once they found out it was filed by the abortion doctor, they would know about the abortion, and, therefore, the exception was really meaningless because they would find out, anyway.

The pregnancy help center provision is different in a couple contexts. One, there is not the concern about that inevitable disclosure, because that statutory scheme is not at issue there. Second, the type of disclosure and the concern of the Court when you're dealing with the abuse scenario, the concern was that the abusive parent would find out about this, which, of course, nobody would want to happen.

Here we are not talking about the abuser finding out. We're talking about a disclosure to one pregnancy help center counselor, whose mission is to assist the woman in dealing with this crisis that she is in. So the concern is different and is not as great in that context.

With regard to the claim about will they expeditiously carry out this requirement, they cite the Bellotti case. What's important, and what I wanted to point out to the Court there, the Plaintiffs cite the Bellotti case suggesting that there has to be something in the Act itself guaranteeing that they will expeditiously carry out this

requirement in order for it to withstand a facial challenge.

That is not, in fact, the case. The statute at issue in Bellotti did not have an expeditiousness requirement in the statute itself. What happened there is they certified a question to the State Supreme Court, when the case went back on remand, about how the matter would be carried out by the judiciary, and the Supreme Court, in answering the questions that were certified, said that the judiciary would promptly carry out the requirement of the statute.

The Court then, when it was conducting the analysis, said that those types of things helped to alleviate the concerns about the expeditiousness. The intervenors in that case took issue with the Supreme Court, relying simply on the assurances of the Supreme Court, rather than actual requirements in the statute.

What the Supreme Court says was in the absence of any evidence as to the operation of judicial proceedings, we must assume, and because they were dealing with the facial challenge where the law hadn't gone into effect yet, we must assume the Supreme Court's judgment is correct. Those safeguards, therefore, avoid much of what was objectionable about the expeditiousness concern.

Likewise, here we have the pregnancy help center policies, which are appropriate for the Court to look at,

because that's the evidence before the Court, which they have indicated they will carry out immediately and within 24 hours, and those provisions are all set out within their intake policies.

I would like to turn briefly to the coercion definition, unless the Court has some other questions on the pregnancy help center requirement.

I noted you asked a question of Plaintiffs' counsel, "Does the state have a compelling interest in ensuring that women are not coerced?" Absolutely, the State has a compelling interest in ensuring that. Plaintiffs admit that not only -- actually I don't believe they did admit that there was a compelling interest. But what they at least admitted, that they are ethically obligated to make this assessment, anyway, regardless of the enactment of 1217.

So as a starting point, it seems like the whole discussion really centers around the definition. The Court can uphold the requirement that the abortion doctor assess the woman and make sure that she is not coerced, even if the Court were to find the definition of coercion unconstitutionally vague.

Moving then to the actual definition, there again, the Court must, according to the precedent of the Court, adopt a construction -- a reasonable construction to save the

constitutionality of the statute. When you read it, what it clearly was meant to do is to enforce the notion that coercion can be more than physical. It can include psychological components, the persuasion, the influence from others.

If it stopped there and didn't have the last phrase, it could be more problematic. But when it says "against her desire," it ultimately leads back to the common sense definition of coercion that everybody applies, and that their doctors have presumably been applying when they sign off on whether or not her decision was coerced, that it has to be her will, her desire.

You can have other people talk to you and persuade you and influencing you. If that causes you to truly change your mind in what you want to do, then you aren't coerced. But if the influence of others is causing you to do something against your desire, then that's coercion.

The doctors at the abortion clinics have been signing off on statements on their Informed Consent Forms already, prior to the passage of this Act, to certify that women aren't coerced. So presumably they have to have been applying a definition, as you pointed out, prior to the enactment of this statute.

THE COURT: The question I had, I was thinking about the definition of coercion that is there. I thought

about Defendants that have been charged criminally. I can tell you they all have a desire to continue on as not guilty rather than guilty, but sometimes their lawyer has talked to them and pointed out the evidence that's against them and may have influenced them or persuaded them that, in fact, it would be in your best interest to plead guilty, because if you go to trial, you're probably going to be convicted.

The Defendant, when they come in, may still have a desire to be not guilty, but they've been persuaded or influenced that it's in their best interest to plead guilty, and, in fact, the evidence would convict them if they did go to trial. The Court would find that it's a voluntary, uncoerced plea on their part.

The concern I have is with the use of the word "desire." It would be one thing if it was "against her will" or that she was "overborne," her free will was "overborne." But people may still maintain desires that they have, even though all of the evidence convinces them otherwise. They may still maintain that desire that they want to carry their child, but all of the evidence has convinced them that they should give up that desire and choose a different course.

So that's a concern I have is the use of the word "desire" is a pretty broad term.

MS. DeVANEY: Well, what we had submitted to the Court in our written Brief is that that term should be interpreted as synonymous with "will." Because what it ultimately means is it has to be her decision, not the people that are influencing her or persuading her.

So that's the most reasonable construction that would permit the statute's constitutionality to be upheld.

THE COURT: But I looked up the definition of "desire" in the dictionary, and it doesn't include "will" or "free will" as a definition. I'm not sure that the State in their Brief can just substitute a different word.

MS. DeVANEY: Well, unfortunately the Court -- it's not a question of which word would we prefer to have there or which word would the Court prefer to convey the meaning, but what word the Legislature actually chose. And can you read the entire provision in its entirety to come up with a reasonable construction that is not unconstitutionally vague?

Again, if you focus on the context in which the entire sentence is written, I think it suggests that it ultimately has to be her desire, and "desire" is meant to be synonymous with her "will."

THE COURT: So go back to Section 3(1), where it says, "The physician and the pregnant mother, prior to scheduling a surgical or medical abortion, the physician

shall do an assessment of the pregnant mother's circumstances to make a reasonable determination whether the pregnant mother's decision to submit to an abortion is the result of any coercion, subtle or otherwise."

What does "subtle or otherwise" mean? It can't mean what "coercion" is, because there would be no reason to put the words in.

MS. DeVANEY: Well, I would submit, Your Honor, again, it was meant to reference these other types of psychological methods of coercion that the definition encompasses. That is the most reasonable reading of the statute that would be consistent with how abortion doctors have, in fact, been applying their ethical duty to assess for coercion.

As I stated initially, Judge, that is the fundamental crux of that requirement, regardless of whether problems are found with regard to the definition itself. The requirement that they have to assess for coercion should be upheld.

THE COURT: And since the doctors are already assessing for coercion, was there any evidence in the record that that assessment hasn't been sufficient?

MS. DeVANEY: Yes. Thank you. I did not mention that initially. But in our submissions to the Court, we submitted portions from deposition transcripts from the

2005 litigation which lays out how that is currently being carried out at the Planned Parenthood Clinic. It is very cursory. That is a reason why the coercion assessment was made more clear and emphasized in HB 1217.

THE COURT: I guess what I was asking, is there evidence that even with a cursory review of coercion that there are women that are claiming that they are being coerced after the new requirement went into effect?

MS. DeVANEY: After the new requirement.

THE COURT: I mean after the doctor started asking about coercion.

MS. DeVANEY: That's not a new requirement. As far as I know, they've had that on their -- well, I don't know when they put that on their Informed Consent Forms. But that specific language isn't in the prior informed consent statute, to my knowledge. So this is the first time it's actually been enacted. But there are forms we know we were using before that had a signature line where they would sign off as to whether or not the woman was being coerced.

The problem is in practice and in effect, they were not spending an adequate amount of time with women to do that. It was a very cursory examination, a question, "Are you firm in your decision?" "Yes." That's it. We go on. Nothing more is explored upon that.

There were women that testified in front of the Legislature that they were crying, that they were expressing concern about that. The provider went ahead and gave them the abortion, anyway.

So that's what prompted the Legislature to enact a specific requirement in the statute requiring the coercion assessment to be done, and attempted to create a definition that encompassed more than just physical-type coercion, but other psychological aspects, as well.

Thank you, Your Honor. That's all I have, unless you have any further questions.

THE COURT: No. That's it. Thank you. Did the Plaintiffs have any reply?

MS. LIU: Yes, Your Honor. I would just like to address a few things that the attorneys for the State mentioned in their reply.

First, with respect to the pregnancy help center mandate, Your Honor, they seem to hinge their entire case on their reading of the statute that women don't have to say anything to the pregnancy help centers.

In addition to the language that is clear from Section 3, Your Honor, I would direct you to language in Section 6. Section 6, Your Honor, says, "A pregnancy help center shall be permitted to interview the pregnant mother to determine whether the pregnant mother has been subject

to any coercion to have an abortion." So I'm not really sure how the pregnancy help centers can make this determination if the woman refuses to say anything.

I would also note that if she doesn't have to say anything to the pregnancy help center, then what proper legislative purpose, much less any supposed compelling interest, could this mandate possibly serve? Indeed, our patients are already required under current law to be referred to a pregnancy help center. So this would be purely redundant.

Indeed, I submit there is no proper purpose. That the State's arguments make clear this is just intended to impose a third trip on our patients and to impose further hurdles to abortion, which is clearly impermissible.

I would like to address, also, Your Honor, their efforts to distinguish themselves from the counselors at issue in the Hill case. Hill involved sidewalk counselors. The law prohibited education, counseling, or the handing of information, which is what the State submits the pregnancy help centers will do here, and in that case there was absolutely no evidence that those sidewalk counselors were ever abusive or confrontational. They were not characterized as harassing or protestors, as the State suggested. I would refer the Court to Page 710 of that decision.

I would also note that the Supreme Court there, even in the face of countervailing First Amendment rights of the sidewalk counselors, which are not present here, in other words, the pregnancy help center has no First Amendment right here, in that case the Court recognized that the patient's privacy interests in avoiding interactions with these type of counselors took precedence.

Third, and just briefly, Your Honor, counsel for the Attorney General's Office discussed the fact that the cases do not necessarily require expedition or confidentiality on the face of the statute. I would refer the Court to the Miller decision at Page 1460 where the Eighth Circuit was abundantly clear that the State may not impose a parental-notice requirement without also providing confidential expeditious mechanisms by which a mature and best-interest minor can avoid it.

So I think it is clear from this case, and also from prior Supreme Court cases, that, indeed, expeditiousness and confidentiality are required on the face of the statute.

In addition, Your Honor, the State goes to great pains to try to minimize the numerous false statements that the legislators made, not only on the floor of the Senate and the House, but also in each of the committees to push the Act through. In no other case am I aware, Your Honor, have

Plaintiffs demonstrated such an utter disregard for existing law, that the Legislature engaged in such an utter disregard for existing law, and engaged in so many numerous and blatant false statements to enact a law that would restrict abortion.

Among other things, they said that we, Plaintiffs, do not meet with women until they are on the surgery table; that we don't tell them about their risks of abortion; that we don't do any consultation or education. These were just a few of the false statements they used to push the Act through.

I would note that we are required by law, by the very law they enacted, the same sponsor enacted in 2005, to do exactly all of these things, and we are, Your Honor, subject to criminal penalties if we fail to comply with this law.

Now, the State says that they don't know if we are meeting these requirements. Well, this is just another false statement. As our opening Brief at Footnote 3 makes clear, Your Honor, we are routinely inspected by the State to ensure we are in compliance with these requirements.

Since this law went into effect three years ago, we have been inspected, I think, on a twice yearly basis to ensure compliance with all laws regulating abortion, including this one.

I would submit, Your Honor, for the Attorney General's Office to sit here and say that they don't know whether a highly regulated and monitored abortion provider is complying with the State's criminal laws is absurd.

Finally, Your Honor, with respect to the same physician requirement, they have said they think it is constitutional, however you read it, meaning that if you read it to require the same doctor at both visits, it is still constitutional.

I would just point the Court to Page 36 of their own Brief where they say that that reading should be rejected because it is "hostile to the constitutionality of the statute." As Gonzales points out, "The elementary rule is that every reasonable construction must be resorted to in order to save a statute from unconstitutionality."

I submit that is a concession that if the law is read to require the same physician, that it would be unconstitutional. Indeed, the State did not attempt to muster any evidence or argument to suggest otherwise.

Thank you, Your Honor.

THE COURT: Thank you, counsel. I'm going to take it under advisement, and I'll issue a written opinion. We'll be adjourned. Thank you.

(End of proceedings)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA :SS CERTIFICATE OF REPORTER
SOUTHERN DIVISION

I, Jill M. Connelly, Official United States District Court Reporter, Registered Merit Reporter, Certified Realtime Reporter, and Notary Public, hereby certify that the above and foregoing transcript is the true, full, and complete transcript of the above-entitled case, consisting of Pages 1 - 96.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties hereto, nor a relative or employee of such attorney or counsel, nor do I have any interest in the outcome or events of the action.

IN TESTIMONY WHEREOF, I have hereto set my hand this 25th day of July, 2011.

/s/ Jill M. Connelly

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